

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Criminal Law Advisory Committee  
Hon. Steven Z. Perren, Chair  
Joshua Weinstein, Attorney, 415-865-7688, [joshua.weinstein@jud.ca.gov](mailto:joshua.weinstein@jud.ca.gov).

DATE: August 6, 2003

SUBJECT: Capital Trials: Appointment of Counsel and Judicial Education (adopt forms CR-190 and CR-191; adopt Cal. Stds. Jud. Admin., § 25.4; and amend Cal. Rules of Court, rule 4.117)

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Issue Statement

The Judicial Council recently adopted rules of court setting forth minimum standards for appointed counsel defending capital cases. However, there is no standardized method of determining counsel's expertise, and courts do not have consistent methods for recording such determinations. In addition, presiding over capital cases presents many unique and complex issues, but there is no statewide standard establishing the training judges should have to hear those cases.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2004:

1. Adopt form CR-190, *Order Appointing Counsel in Capital Case*, and form CR-191, *Declaration of Counsel for Appointment in Capital Case*, and amend rule 4.117 of the California Rules of Court to assist the courts in appointing counsel in capital cases; and
2. Adopt section 25.4 of the California Standards of Judicial Administration to set forth recommended training for judges handling capital cases.

The text of the proposed rule and standard are attached at pages 4 and 5; the text of the proposed forms are attached at pages 6 and 7.

### Rationale for Recommendation

Proposed forms CR-190 and CR-191 are designed to assist the court in making an appropriate record regarding the selection of counsel in capital cases. Both would be mandatory forms. New subdivision (i) of rule 4.117 would mandate use of the two forms when the court appoints counsel.

Proposed form CR-190, *Order Appointing Counsel in Capital Case*, memorializes the court's appointment of counsel. The court is to indicate whether counsel is lead or associate counsel under rule 4.117(d) or (e). A third option on the form memorializes appointments under rule 4.117(f), which allows the court to appoint qualified counsel who do not meet the standards set forth in rule 4.117(d) or (e). In that situation, the court is to indicate whether the counsel is lead or associate counsel and the bases for finding counsel qualified.

Proposed form CR-191, *Declaration of Counsel for Appointment in Capital Case*, would be completed by counsel seeking appointment in a capital case. The form calls for counsel to indicate his or her qualifications warranting appointment, mirroring the requirements for appointment set forth under rule 4.117(d) and (e). Also included on the form is a check box for counsel to indicate that he or she has a declaration stating his or her qualifications are on file with the court. It is anticipated that this provision would be used by courts that have prequalified counsel for appointment to capital cases.

The proposed subdivision 4.117(i) would mandate that the court and counsel complete forms CR-190 and CR-191 when counsel is appointed in a capital case. The statewide use of this form will result in consistent records setting forth the qualifications and appointment of counsel.

Proposed section 25.4 of the Standards of Judicial Administration would set forth the recommended training for judges presiding over capital cases. The specialized training of judges was first proposed in comments that the committee received last year when it circulated the rule setting minimum standards for defense counsel. Both the American Bar Association and Illinois' April 15, 2002, *Report of the Governor's Commission on Capital Punishment* endorse training for judges hearing capital trials. Given the complexity and unique issues in capital cases, the committee concluded that judges presiding over these cases should be specially trained.

Two levels of judicial education are suggested in section 25.4: a comprehensive curriculum for all judges assigned a capital case and a periodic update course for judges to take upon subsequent capital case assignments. A judge should complete the update if he or she has not completed capital case judicial education within two years of the current capital case assignment. The exact content of the course would be developed by the Center for Judicial Education and Research (CJER), although the standard does provide

that the periodic update “may be provided through actual classroom instruction or through video, audio, or other media as determined by CJER.”

#### Alternative Actions Considered

The committee considered but decided against exempting (or “grandfathering in”) judges with significant capital case experience. The committee recognized that those judges may not benefit from training as much as less experienced judges; however, it concluded that all judges benefit from judicial education and that the experienced judge’s presence would also benefit the other attendees.

#### Comments From Interested Parties

The proposal was circulated for 11 weeks during the Spring 2003 comment cycle. There were three comments, all agreeing with the proposal. Two voiced concerns (1) that a verdict may be “compromised” if the case is heard by a judge who has not completed the suggested training, and (2) that because of increasing judicial educational requirements (in all fields) “we won’t spend much time on the bench.” While both raise valid points, the committee noted that standards of judicial administration are discretionary, so failure to complete judicial education would not—in and of itself—compromise a trial. Moreover, the committee concluded that the benefits of judicial education in this specialized area outweigh lost “benchtime.”

The chart listing the comments and the committee’s responses is attached at page 8.

#### Implementation Requirements and Costs

Implementation costs for the rule and forms would be limited to the cost of copying forms.

Implementation costs for section 25.4 would include travel and education expenses for the judge attending training and possibly the cost for an assigned judge to sit in for the judge during training.

#### Attachments

Rule 4.117 of the California Rules of Court is amended, effective January 1, 2004,  
to read:

**Rule 4.117. Qualifications for appointed trial counsel in capital cases**

**(a)–(h) \*\*\***

**(i) [Order appointing counsel]** When the court appoints counsel to a capital case, the court must complete Judicial Council form CR–190 (*OrderAppointing Counsel in Capital Case*),and counsel must complete Judicial Council form CR-191 (*Declaration of Counsel Seeking Appointment in Capital Case*).

Section 25.4 of the California Standards of Judicial Administration is adopted, effective January 1, 2004, to read:

1 **Sec. 25.4. Judicial education for judges hearing a capital case**

2  
3 (a) The California Center for Judicial Education and Research (CJER) should  
4 provide a comprehensive curriculum and periodic updates for training on  
5 California law and procedure relevant to capital cases. The periodic update  
6 may be provided through actual classroom instruction or through video,  
7 audio, or other media as determined by CJER.  
8

9 (b) A judge assigned to a capital case should attend the comprehensive training  
10 specified in (a) before commencement of the trial. A judge with a  
11 subsequent assignment to a capital case, the judge should complete the  
12 periodic update course described in (a) within two years before the  
13 commencement of the trial.

<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	FOR COURT USE ONLY  <div style="text-align: center; font-size: 2em; font-weight: bold;">DRAFT 4</div> <div style="text-align: center; font-size: 2em; font-weight: bold;">9/26/03</div>
PEOPLE OF THE STATE OF CALIFORNIA  <div style="text-align: center;">VS.</div>  DEFENDANT:	
<b>ORDER APPOINTING COUNSEL IN CAPITAL CASE</b>	CASE NUMBER:

1. On *(date)*: \_\_\_\_\_ the court appointed *(attorney)*: \_\_\_\_\_ as counsel to  
 represent *(defendant)*: \_\_\_\_\_ in the above-entitled case.
  
2. The court finds counsel qualified for appointment in this matter
  - a. ☐ as Lead Counsel under rule 4.117(d) of the California Rules of Court.
  - b. ☐ as Associate Counsel under rule 4.117(e) of the California Rules of Court.
  - c. ☐ as *(specify)*: \_\_\_\_\_ Counsel under rule 4.117(f) of the California Rules of Court. The basis  
 for finding counsel qualified under this section is:

Date: \_\_\_\_\_

 \_\_\_\_\_  
 JUDGE OF THE SUPERIOR COURT

**SPR03-26****Capital Trials: Appointment of Counsel and Judicial Education**

(adopt forms CR-190, Order Appointing Counsel in Capital Case, and CR-191, Declaration of Counsel Seeking Appointment in Capital Case; adopt Cal. Stds. Jud. Admin., § 25.4; and amend Cal. Rules of Court, rule 4.117)

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Ms. Linda Finn Deputy Executive Officer Superior Court of California, County of Ventura	A	N	Concern that judicial education classes on capital cases would not be available and could compromise a trial for lack of a “trained” judge.	Proposal is for a Standard of Judicial Administration and is not mandatory. Failure to comply in itself would not compromise trial.
2.	Mr. Robert Gerard President Orange County Bar Association	A	Y	None.	.
3.	Hon. Dennis E. Murray Presiding Judge Superior Court of California, County of Tehama	A	N	I have no particular objection to this, but being from a small court, where we handle a wide range of cases, I can’t help but note that with the educational requirements or recommendations for ethics, family law, dependency law and now capital cases, if we keep it up, we won’t spend much time on the bench.	